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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ISAIAS RODRIGUEZ, Defendant and Appellant.	E069177 (Super.Ct.No. RIF1504003) OPINION

APPEAL from the Superior Court of Riverside County. Patrick F. Magers, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Christine Levingston Bergman and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

Following a trial, the jury convicted defendant and appellant Isaias Rodriguez of three counts of lewd and lascivious acts upon a child under 14 years of age (Penal Code § 288, subd. (a)[1]), one count of attempted use of a minor to prepare matter containing sexual content (§§ 664, 311.4, subd. (c)), and one count of possession of obscene matter showing sexual conduct by a minor (§ 311.4, subd. (a)). The jury also found true that defendant came within the guidelines for enhanced sentencing for lewd and lascivious acts upon multiple victims under the age of 14 (§ 667.61), and for possession of more than 600 images of a child under the age of 18 personally engaging in or simulating sexual conduct of a pornographic nature, and that 10 or more of those images involved a prepubescent minor or a minor who had not attained 12 years of age (§ 311.11, subds. (a) & (c)).

The trial court sentenced defendant to 77 years four months to life, which included a consecutive four-month term for attempted use of a minor to create pornography. On appeal, defendant contends that the four-month term should be stayed in accordance with subdivision (a) of section 654 because his attempt to use the victim to create pornographic images was argued by the People to be part of one of the other lewd acts involving the victim for which he was also convicted. We disagree and affirm.

BACKGROUND

On a summer afternoon, defendant went to the home of a friend (the victim's father) to help with running cable line to a tree house. The victim, then seven years old,

[1] All further statutory references are to the Penal Code unless otherwise noted.

was in the yard playing with her dog. When the father went inside to get a part needed for the project, defendant asked the victim to come over to him. After engaging her in conversation about her dog, defendant got his phone, put his hand inside the victim's shorts, pushed her underwear to the side, and used two fingers to rub what the victim described as her private part where the pee comes out, and he took a picture. He then told her to sit in the sand box and to open her legs. He took another picture of her private part and he rubbed it again. He touched her in this manner at least twice. He then told her not to tell anybody because her parents would get mad and went up into the tree house.

The victim went inside her home and told her mother what defendant had done. The mother told the father and together they demanded defendant's cell phone. He broke the phone, gave it to the victim's parents, and left. The victim's family called the police and gave defendant's phone to the officers who responded.

Later that day, a deputy sheriff found defendant at home and took him to the station for questioning. There, defendant identified the cell phone as his and consented to its search, which revealed 21 photographs of the victim fully clothed and two blurred images. A subsequent search of his home resulted in discovery of defendant's journal wherein he described his encounter with the victim, including putting his fingers under her shorts, moving her underwear to the side, putting his fingers "inside of her richness" to the point that her odor remained on his fingers, telling her to sit in front of him, and taking pictures.

Also discovered in the course of the search of defendant's home were a collection of girls' soiled underwear, photographs of girls' soiled underwear, and approximately 78,000 images of child pornography. Many of the pictures were of more than 10 children under the age of 12 years, and some were of children as young as six months old. The photographs led to the identification of 10-year-old Jane Doe 3,[2] who had been a victim of defendant's lewd conduct, and whose dirty underwear was found in his home.

Defendant was arrested and charged with three counts of lewd and lascivious acts upon a child under 14 years of age (§ 288, subd. (a)), two as to the victim and an additional lewd conduct count as to Jane Doe 3; one count of attempted use of the victim to prepare matter containing sexual content (§§ 664, 311.4, subd. (c)); and one count of possession of obscene matter showing sexual conduct by a minor (§ 311.4, subd. (a)). Also alleged was that defendant violated subdivision (e)(4) of section 667.61 by subjecting multiple victims under the age of 14 to lewd and lascivious acts, and that he violated subdivisions (a) and (d) of section 311.11 by possessing more than 600 images of a child under the age of 18 personally engaging in or simulating sexual conduct, and that 10 or more of those images involved a prepubescent minor or a minor who had not attained 12 years of age.

A jury convicted defendant on all counts. The trial court sentenced him to 77 years four months to life, which included three consecutive indeterminate terms of 25

[2] The amended felony complaint refers to the second victim as Jane Doe 3, but the parties refer to her as Jane Doe 2.

years to life for the lewd acts upon children under the age of 14, a consecutive two-year term for possession of the pornographic images, and a consecutive four-month term for attempted use of a minor to create pornography. He appealed.

DISCUSSION

Defendant contends that the four-month sentence imposed for the attempted use of a minor to prepare matter containing sexual conduct (§§ 664, 311.4, subd. (c)) should have been stayed in accordance with section 654 because it was based on the same act forming the basis of one or the other of the two lewd conduct counts involving the victim. We disagree and affirm.

The issue whether the trial court should have stayed the sentence imposed for the attempt to use the victim to create pornography was not raised below but, because a sentence imposed in violation of section 654 is unauthorized, it may be corrected on appeal whether or not the defendant raised the issue in the trial court. (*People v. Brents* (2012) 53 Cal.4th 599, 618 (*Brents*); *People v. Le* (2006) 136 Cal.App.4th 925, 931.)

Subdivision (a) of section 654 states that a criminal act that is punishable in different ways by different provisions of law must be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act be punished under more than one provision. The statute precludes not only more than one punishment for multiple violations arising from a single act, but also forbids more than one punishment for a course of conduct comprising multiple acts undertaken with a

single intent or objective. (*People v. Corpening* (2016) 2 Cal.5th 307, 311; *People v. Latimer* (1993) 5 Cal.4th 1203, 1208 (*Latimer*).)

If the evidence reveals that multiple offenses were committed with independent, separate objectives, then the course of conduct is divisible, and the defendant may be punished for each of the offenses committed even though the violations share common acts or are part of an otherwise indivisible course of conduct. (*Latimer*, *supra*, 5 Cal.4th at pp. 1211-1212.) And, in a case like the present one in which a defendant is found guilty of multiple sex offenses, each offense may be punished even if the defendant had a single objective, unless the offenses were either "incidental to or the means by which another crime was accomplished." (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006-1007.)

Whether a course of criminal conduct violating more than one penal statute constitutes a divisible course of action and whether the violations were committed with separate criminal intents or objectives are ordinarily questions of fact for the trial court, which is vested with wide latitude in making its determination. (*Brents*, *supra*, 53 Cal.4th at p. 618; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) On appeal, the trial court's express and implied findings with respect to section 654 will be upheld if there is any substantial evidence to support them when the evidence is viewed, and inferences are drawn, in the light most favorable to the respondent. (*Jones*, at p. 1143.)

Defendant was charged with and convicted of different crimes pertaining to separate acts involving the victim, including violations of sections 288 and 311.4.

Subdivision (a) of section 288 provides in relevant part that any person who willfully commits any lewd or lascivious act with or upon the body of child under 14 years old with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony.

Subdivision (c) of section 311.4 provides in relevant part that any person who knowingly persuades a minor under the age of 18 to pose for purposes of preparing an image that contains or incorporates in any manner a live performance of sexual conduct by the minor is guilty of a felony. Subdivision (d) of section 311.4 defines the term "sexual conduct" contained in subdivision (c). Those definitions encompass directing a minor to pose with legs spread to expose the genital or pubic area (even if clothed) if the purpose is sexual stimulation of the viewer as well as any lewd or lascivious sexual act set forth in section 288. (§ 311.4, subd. (d); *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1755-1756.)

Here, the imposition of a sentence for each of the section 288 violations and for the violation of section 311.4 reflects an implied finding by the trial court that the offenses were separate acts; neither episode of lewd touching of the victim was incidental to, or the means by which, defendant attempted to take pornographic pictures of her. That decision is amply supported by substantial evidence. The attempt to use the minor to create a pornographic image was accomplished when defendant directed the seven-year-old victim to pose for a picture in a manner that exhibited her genitals or pubic area so he could take a picture intended to be sexually stimulating. (§ 311.4, subds. (c) & (d).)

By defendant's own account, he put his fingers inside her vaginal area before directing her to sit in front of him and spread her legs. The victim also stated that, after the second touching, defendant stood up and then took a picture. In the circumstances, it was reasonable for the trial court to conclude that the lewd rubbing of the victim's vaginal area was separate and distinct from attempting to create a pornographic image within the meaning of subdivision (c) of section 311.4.

Defendant contends we are constrained to treat as a single act of lewd conduct the attempt to use the victim to create pornography in violation of 311.4 and one instance of his touching of her genital area in violation section 288 because that was the theory of the case presented by the People to the jury. In support of his single-act argument, he posits that one of the elements necessary to establish the section 311.4 violation—that minor "participated in the sexual conduct"—which was included in the CALCRIM instruction given to the jury, requires a "completed sexual act." He further claims that, in this case, the People's theory was that "completed sexual act" for the purposes of section 311.4 was necessarily one of the two times he touched the victim in a lewd manner, and that inexorably leads to the conclusion that the same act resulted in violation of sections 311.4 and 288. Defendant then suggests that this court is not permitted to treat the violations as a divisible course of conduct because we are bound by the theory of the case presented to the jury. His contentions are unavailing.

The proposition that the phrase "sexual conduct" in section 311.4 and CALCRIM No. 1144 means a "completed sexual act" is not tenable. Subdivision (d) of section 311.4

sets forth a lengthy and varied list of definitions for "sexual conduct," including "exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer," as occurred here. "Completed sexual act" is not included in the list. (§ 311.4, subd. (d); CALCRIM No. 1144.) The instruction simply incorporates the language of the statute. (CALCRIM No. 1144.)

In addition, the record does not support defendant's claim that the sole theory presented by the People to the jury was that the touching in violation of section 288 was the same "sexual conduct" referred to in section 311.4. The People argued that the section 311.4 violation was committed when defendant directed the victim, whom he knew to be a young child, to "open her legs" so that he could take pictures for the purpose of his sexual stimulation. This conduct was independent of his touching of her.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

FIELDS
J.

MENETREZ
J.